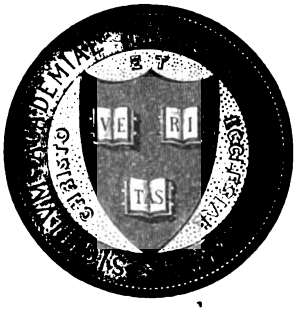

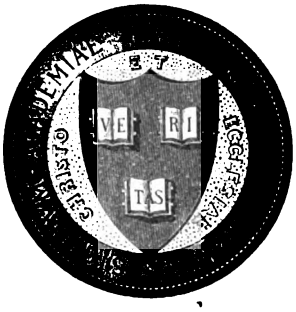

THE MEDIEVAL LAW OF INTESTACY

BY

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DURING the middle ages the last will was usually the epilogue of the last confession.[1] The intestate was regarded with horror as an infamous person who had died unconfessed. For if he had made confession on his death-bed, the priest before granting absolution would have persuaded the dying man to make a will by which he would bestow a part of his movables on the church and the poor for the repose of his soul.[2] The intestate, therefore, must have died without providing for his salvation; he could not be buried in consecrated soil, and in some parts of Europe his personal property was forfeited to his feudal lord.[3] In England during the first half of the thirteenth century the prelates secured the right to distribute such property, but a statute of 1357 required the ordinary to commit the work of administration "to the next and most lawful friends of the dead," who were to make provision for the welfare of his soul and were accountable to the ordinary. The rule was after payment of debts to give a third of his movables to the wife and a third to the children (the bairns' part), while the other third (the dead's part) was expended for pious works; if he left a wife but no children, or children but no wife, the dead's part was a half.[4]

It has recently been asserted that intestacy was rare in England because it was easy to make a will and because the chroniclers

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[1] Auffroy, Évolution du Testament en France, 555; *cf. ibid.*, 376–84. "Very often a man makes no will until he feels that death is near": Pollock and Maitland, English Law, 2nd ed., ii. 340.

[2] The prelates order that when a man makes a will he should dispose of part of his property for the good of his soul; also that a priest should be present when a will is made: Wilkins, Concilia, i. 583, 638, ii. 155, 156.

[3] Du Cange, Glossarium, s. v. *intestatio*; Établissements de Saint Louis, ed. Viollet, iv. 42–49; Caillemer, Confiscation et Administration des Successions par les Pouvoirs Publics, 43–54; Pollock and Maitland, bk. ii. ch. vi. § 4. Caillemer believes that in some parts of France the confiscation of the intestate's goods by the lord was not a punishment for a religious offense, but a stage in the development by which serfs obtained the right to dispose of their property.

[4] On the history of the English law of intestacy, see Selden, The Disposition of Intestates' Goods (Collected Works, iii. 1677); Moore, Reports of Cases heard by the Judicial Committee of the Privy Council, v. 434–98; Makower, Const. Hist. of the Church of England, 428–31; Pollock and Maitland, bk. ii. ch. vi. § 4 (the best account of the subject); on the history of legitim, *ibid.*, bk. ii. ch. vi. § 3.

treat intestacy as a scandal.[1] While the paucity of references to intestates in the records tends to confirm this view, most of the cases referred to by the chroniclers seem to relate to men who had fair warning that death was approaching, not to those who died suddenly; and the coroners' rolls show that such sudden deaths were very common. Therefore, since a man usually made his will on his death-bed,[2] intestacy could not have been rare; and the records which we shall soon examine show clearly that intestates who died suddenly were regarded with less horror than those who died under normal conditions.

Much obscurity overhangs the English law of intestacy before the thirteenth century. Blackstone, adopting the opinion of Coke,[3] says that "by the old law the king was entitled to seize upon his [the intestate's] goods, as the *parens patriae* and general trustee of the kingdom."[4] On the other hand, Selden and Pollock and Maitland deny that this was ever a prerogative of the crown. Though Coke's contention appears to be untenable, it would not have been strange if the strong English monarchy, adopting the principle of the Norman law, had insisted that the movables of intestates should be dealt with in the same way as those of deceased usurers. The Grand Coutumier of Normandy says that all the chattels of those who, after an illness of nine days or more, die unconfessed, belong to the duke, though some lords possess this right by charter or prescription;[5] and, according to an inquest made by order of Philip Augustus in 1205 regarding the laws which Henry II. and Richard I. had observed in Normandy, all the movables of an intestate who lay ill in bed three or four days before his death were forfeited to the king or to the lord.[6] In 1190 the clergy of Normandy claimed, however, that if any one dies suddenly without leaving a will his personal estate should be distributed by the church.[7] This was evidently a mooted question

[1] Pollock and Maitland, ii. 360, rejecting Selden's opinion that intestacy was common.

[2] *Ibid.*, ii. 340.

[3] Reports, ix. 38 b.

[4] Commentaries, bk. ii. ch. 32.

[5] Coutumiers de Normandie, ed. Tardif, ii. 56, ch. 20.

[6] "Omnia mobilia ipsius domini regis debent esse aut illius in cujus terra est": Teulet, Layettes du Trésor des Chartes, i. no. 785; Duchesne, Hist. Norm. Scriptores, 1060 *cf.* Tardif, Coutumiers de Normandie, i. pt. ii. 93; Delisle, Cat. des Actes de Philippe-Auguste, no. 961.

[7] "Distributio bonorum ejus ecclesiastica auctoritate fiet": Ralph of Diceto, Imagines Historiarum (Rolls Series), ii. 88.

in Normandy regarding which there were disputes between the lay and ecclesiastical authorities.

Certain passages may be found in the records which at first view seem to lend some support to the theory of Coke and Blackstone, but when carefully scrutinized they fail to carry conviction. For example, in 1255 Henry III. grants to the burgesses of St. Omer that if any of them shall die in the king's dominions testate or intestate, he will not confiscate their goods, but will allow their heirs to have them;[1] probably Henry III. is here merely safeguarding the men of St. Omer against reprisals.[2] In 1268 the citizens of Dublin contended that the movable property of intestates belonged to the crown, but for this and other misdemeanors they were excommunicated.[3] Moreover, various passages in the rolls of the twelfth and thirteenth centuries show that the chattels of intestates were sometimes seized by the king,[4] but in these cases he was probably exercising this right because he was the feudal lord. In 1284 Edward I. craved a grant of the goods of intestates from Pope Martin IV., to help pay the expenses of his proposed crusade, and met with a refusal,[5] though a grant of this sort had been made in 1256.[6] These negotiations with the papacy imply that

[1] Cal. of Charter Rolls, i. 441.

[2] *Cf.* Rot. Lit. Claus., i. 620.

[3] "Nullus praelatus vel judex ecclesiasticus . . . de bonis eorum qui intestati decedunt se aliquatenus intromittat, sed fisco bona hujusmodi applicentur": Gilbert, Historic Documents (Rolls Series), 181; Chartae Hiberniae, 32.

[4] "Aldredus de Muchelegate debet lx. marcas de catallis Reginaldi qui obiit in domum suam (*sic*) sine divisa": Pipe Roll, 16 Hen. II. p. 46. "Rogerus [de Floketorp] cepit de Emma quae fuit uxor Hugonis Flaxenebert de Kyneburl' per manum Eustacii Noth de eadem, executoris dicti Hugonis, eo quod imposuit eis quod dictus Hugo decessit intestatus et quod medietas bonorum suorum fuit domino regi, et ideo cepit xx. s. ad opus suum proprium": 3 Edw. I., Rotuli Hundredorum, i. 447. This was wrongfully exacted, for a jury found that Hugh had died testate. Roger was the bailiff of a manor that had escheated to the king. See *ibid.*, i. 445, 449. See also Rot. Lit. Claus., i. 537 (writ, 7 Hen. III., stating that Richard Fitzdune did not die intestate, and therefore his chattels seized on behalf of the king are to be given to his executors); Close Roll, 17 Hen. III., cited by Selden, Works, iii. 1682 (writ ordering that a parson is to have his mortuary out of the chattels of Robert de Weston, who died intestate). It is difficult to accept Selden's contention that the writ of 7 Hen. III. refers to seizure for a debt due to the king.

[5] Cal. of Papal Registers, i. 474.

[6] "Omnia bona mobilia ab intestato decedentium sive de regno Angliae sive de aliis terris [regis Angliae] . . . pro illa portione quae juxta patriae consuetudinem decedentes contingit . . . ad opus . . . regis Angliae ut votum suum efficacius exequi valeat": Rymer's Foedera (Rec. Com.), i. 345. In 1248 Innocent IV. decreed that the goods of intestates should be set aside by the bishops for the needs of the Holy Land: Fournier, Les Officialités, 89. At the parliament of Carlisle, in 1307, complaint was made that officers of the pope demand for his use all the goods of intestates: Rotuli Parl., i. 220.

Henry III. and Edward I. did not regard such goods as the property of the crown.

The evidence at our disposal indicates that, according to the older law of England, the personal property of the intestate was forfeited to the feudal lord. Cnut's doom seems to imply that already before the Norman Conquest the lords were trying to obtain this right: "If anyone dies intestate, be it through his neglect or through sudden death, then let not the lord draw more from his property than his lawful heriot; and according to his direction let the property be distributed very justly to the wife and children and relations." [1] Domesday Book tells us that in the time of Edward the Confessor the king could seize all the goods of his citizens of Hereford dying without a will.[2] The rule set forth in Leis Willelme, ch. 34, that the children of an intestate shall divide the inheritance among them equally,[3] may be construed as an assertion against the claims of the lords. The coronation charter of Henry I. says that if any royal vassal meets a sudden death by arms or sickness and makes no disposition of his effects (*pecunia*), his wife, children, kinsmen, or liege men shall distribute them for the good of his soul.[4] This regulation applies only to royal vassals, and it seems to imply that, except in cases of sudden death, the king as lord might exercise the power of confiscation.[5] Glanvill clearly states that when any one dies intestate all his chattels are understood to belong to his lord,[6] and this seems to be confirmed by some entries in the Pipe Rolls of Henry II.[7] The chapter of John's Great Charter enacting that the chattels of a

[1] Cnut's Laws, ii. ch. 70: Liebermann, Gesetze, i. 356.

[2] Below, p. 126, n. 5.

[3] Liebermann, Gesetze, i. 514.

[4] *Ibid.*, i. 522. According to King Stephen's charter, the goods of intestate clerics were to be distributed for the benefit of the soul by the counsel of the church: Stubbs, Select Charters, 120; *cf.* Pollock and Maitland, English Law, 2nd ed., i. 519. In 1190 the clergy of Normandy claimed that such goods do not belong to the secular power, but should be distributed by episcopal authority for pious uses: Ralph of Diceto, Imagines Hist., ii. 87.

[5] According to the Grand Coutumier of Normandy and the Établissements de Saint Louis, *desperati* or *inconfessi* do not forfeit their movables in case of sudden death, but only after a fatal illness of eight or nine days: Auffroy, Évolution du Testament, 556; Du Cange, s. v. *intestatio*. See also the rule laid down by the clergy of Normandy in 1190 and the inquest made in 1205, above, p. 121.

[6] Bk. vii. ch. 16: "Cum quis vero intestatus decesserit omnia catalla sua sui domini esse intelliguntur; si vero plures habuerit dominos, quilibet eorum catalla sua recuperabit quae in feodo suo reperiet."

[7] 18 Hen. II., pp. 98, 133.

free man who dies intestate should be distributed by the hands of his near kinsmen or friends under the supervision of the church,[1] seems to have transferred power from the king and other lords to the prelates; and, though this chapter was omitted in the confirmations of the charter, probably because it collided with the interests of the lay lords, the church exercised the right to distribute the personal property of intestates since the second quarter of the thirteenth century[2] and perhaps since the early part of Henry III.'s reign. The constitutions of Walter of Cantilupe, bishop of Worcester (1240), assert that the distribution should be made under the supervision of the lord and him whom the bishop shall have deputed for that purpose.[3] This arrangement looks like a compromise in a struggle between the barons and the prelates or between the principles set forth in Cnut's doom and in John's charter. Bracton's statement of the law of his time is also reminiscent of the older law: "If a free man dies intestate and suddenly, his lord should in no wise meddle with his goods, save in so far as this is necessary in order that he may get what is his, namely, his heriot, but the administration of the dead man's goods belongs to the church and to his friends, for a man does not deserve punishment although he has died intestate."[4]

There are, moreover, indications that in Bracton's day and later the lords remembered their old right, and sometimes tried to assert it in defiance of the church. In the articles presented to Henry III. by the bishops in 1257, it is stated that the king and other feudal lords seize the goods of intestates, and do not permit their debts to be paid or the residue to be applied by the ordinary to the use of the children or kinsmen and to other pious uses.[5] Lords who do this were threatened with excommunication at the Council of Merton in 1258, and at the Council of Lambeth in 1261.[6] In 1279 Archbishop Peckham rebukes Llewellyn, prince of Wales, for confiscating "*bona intestatorum vestrorum*";[7] and in 1305 the bishop of Llandaff complains to Edward I. that the magnates will not

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[1] Stubbs, Select Charters, 300, ch. 27.

[2] In 1239 a rule is made regarding the administration of the goods of intestates in the absence of the bishop: Wilkins, Concilia, i. 664.

[3] *Ibid.*, i. 675.

[4] Bracton, f. 60 b, ed. Twiss, i. 480. Bracton's text is open to the interpretation that if intestacy is not occasioned by sudden death it may be a cause of forfeiture.

[5] Matthew Paris, Chronica Majora, ed. Luard, vi. 358; Wilkins, Concilia, i. 728; *cf. ibid.*, i. 724.

[6] *Ibid.*, i. 740, 754; *cf. ibid.*, ii. 705.

[7] Registrum J. Peckham, i. 77.

allow him to administer the goods of intestates.[1] The lords also continued, in some parts of England at least, to confiscate the chattels of their villeins dying intestate.[2]

In the marches of Wales the old law in favor of the lords seems to have been maintained long after the reign of Edward I. In 1278 the lord of Kemes agreed to waive his claim to the property of intestates.[3] In 1352 Edward III. ordered three commissioners to inquire whether Sir Henry Hastings, a tenant-in-chief, and others died intestate, and whether, according to the custom of the marches of Wales, all the chattels of tenants dying intestate belonged to their lords. A jury sworn before two of the commissioners in 1354 declare that from time immemorial it has been customary for the lords to have all such chattels.[4] They say that Sir Henry left a will, but that Grono ap Ievan died intestate during the present reign; his chattels are worth 40*s*.[5] An attempt was made to enforce the old custom as late as the reign of Edward VI.[6]

Attention must finally be called to the town charters, which, though they contain many references to intestacy, have been passed over in silence by all writers on this subject. Their examination will confirm the view that long after Bracton wrote his law-book the king and other lay lords still remembered their old right, and that their tenants, in the boroughs at least, regarded exemption from its exercise as a privilege. The following list of references to the evidence on this subject does not profess to be exhaustive.[7]

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[1] Memoranda de Parliamento, 1305, ed. Maitland, 73. The king answered that he would not interfere with the custom of the country, meaning perhaps the custom of Wales. For conflicts arising from the claims of the prelates in France, see Auffroy, Évolution du Testament, 558–60.

[2] Court Rolls of the manor of Wakefield, ed. Baildon, i. 256, 260; Rotuli Hundredorum, ii. 758; Pollock and Maitland, 2nd ed., i. 417. Some lords did not permit their serfs to make wills or impeded their execution: Letters from Northern Registers, 73; Wilkins, Concilia, i. 724, 740, 754, ii. 155, 553, 705.

[3] "Item si aliquis liber homo de Kemeis decedat intestatus praedictus dominus nihil habebit de bonis intestati": Baronia de Kemeys (Cambrian Archaeol. Assoc.), 59.

[4] "Consuetudo est in marchia Walliae optata [? obtenta] et usitata quod domini partium illarum omnia bona et catalla tenentium suorum in partibus illis intestatorum decedentium ratione dominii sui praedicti habent et habere consueverunt a tempore quo non extat memoria."

[5] Baronia de Kemeys, 14, 71.

[6] *Ibid.*, 15. In 1485 we hear of the office of selling goods of intestates in the county of Flint, — an office which seems to have been in the gift of the king: Rotuli Parl., vi. 353.

[7] The references are to town charters, excepting those concerning Cardiff, Hereford, Preston, and Tewkesbury, which are to customals or to Domesday Book. The asterisk indicates that the privilege was granted by a baron. Where there is no asterisk the reference is to a royal charter, except in the cases of Hereford and Preston.

Bala, 1289: Record of Caernarvon, 175.
Bath, 1256: Warner, History of Bath, app. xlv.
Beaumaris, 1296: Record of Caernarvon, 159.
Bere, 1284: Archaeologia Cambrensis, 1849, iv. 216.
Bristol, 1256: Seyer, Charters of Bristol, 22.
*Cardiff, before 1183: Clark, Cartae de Glamorgan, iii. 78.[1]
Cardigan, 1284: Placita de quo Warranto, 821.
Carmarthen, 1257: Charters of Carmarthen, 7.
Carnarvon, 1284: Record of Caernarvon, 185.
*Chester, *c.* 1200: Hist. MSS. Com., viii. 356.[2]
Chester, 1300: *ibid.*, viii. 357.[3]
Conway, 1284: Record of Caernarvon, 163.
Cork, 1242: Chartae Hiberniae, 25.[4]
Criccieth, 1284: Record of Caernarvon, 197.
Flint, 1284: Taylor, Notices of Flint, 32.
Guildford, 1257: Cal. of Charter Rolls, i. 456.
Harlech, 1284: Record of Caernarvon, 193.
*Haverfordwest, 1219–31: English Hist. Review, xv. 518.[4]
Haverfordwest, 1291: *ibid.*
Hereford, 1086: Domesday Book, i. 179 a.[5]
*Kells, *temp.* John: Chartae Hiberniae, 17.[6]
*Kidwelly, 1329: Archaeologia Cambrensis, 1856, ii. 276.[7]
Kingston-upon-Thames, 1256: Roots, Charters of Kingston, 28.
*Laugharne, 1300: Archaeologia Cambr., 1879, x. suppl. xlii.
Newborough, 1284: Record of Caernarvon, 179.
*Newport (Pembrokesh.), 1192(?): Baronia de Kemeys, 15, 50.[8]
Northampton, 1257: Cal. of Charter Rolls, i. 459.
Oswestry, 1398: Shropsh. Archaeol. Soc., Trans., ii. 192.

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[1] "Item quacunque morte burgensis praeoccupatus fuerit, nisi per nequitiam dampnatus, uxor ejus et liberi sui habebunt catalla mortui vel proximi parentes ipsius tanquam heredes si non habuerit uxorem vel liberos." From a customal of the twelfth century.

[2] "Et si aliquis civis de praedicta civitate in servitio meo occisus fuerit, de catallis suis fiat ac si ipse rationabile testamentum fecisset."

[3] Whether they die testate or intestate, the goods of the citizens are not to be confiscated by the king but are to go to their heirs.

[4] "Heres burgensis quacumque morte praeoccupati habeat hereditatem et catallum patris sui."

[5] "Si quis morte praeventus non divisisset quae sua erant, rex habebat omnem ejus pecuniam."

[6] "Quicumque praedictorum burgensium de K. sive in terra sive in mari testatus vel intestatus obierit, heres ipsius duodecim denarios in relevium pacabit et hereditatem suam quiete possidebit."

[7] Henry, duke of Lancaster, grants, 2 Edw. [III.], that if any burgher should die intestate his son and heir shall have his property "without challenge of us or our heirs."

[8] "Item si burgensis moritur de quacunque morte morietur, nisi per judicium pro felonia vitam suam amittat, ego nihil habebo de catallo nisi relevium scilicet xii. d."

*Oswestry, 1407: *ibid.*, ii. 199.
Oxford, 1257: Ogle, Royal Letters, 11.
Pembroke, *temp.* Hen. II.: Cal. of Patent Rolls, 1377–81, p. 107.[1]
Preston, *temp.* Hen. II. (?): English Hist. Review, xv. 499.[2]
Rhuddlan, 1279: Cal. of Patent Rolls, 1272–81, p. 324.
*Saltash, *temp.* Hen. III.: Luders, Reports, ii. 119.[3]
Shrewsbury, 1256: Owen and Blakeway, Hist. of Shrewesbury, i. 121.
Stamford, 1257: Cal. of Charter Rolls, i. 472.
*Tenby, *temp.* Hen. III.: English Hist. Review, xvi. 103.[4]
*Tewkesbury, before 1183: Clark, Cartae de Glamorgan, iii. 78.[5]

The same formula is used in the royal charters with few exceptions:[6] the king promises that if any burgesses should die within his dominions testate or intestate, he will not cause their chattels to be confiscated, but the heirs shall have them intact, in so far as it can be shown that they belonged to the deceased, provided that sufficient knowledge or proof of the heirs can be had.[7] Perhaps the

[1] "Et [si] burgensis ejusdem villae quacumque morte et quocumque loco sive in terra sive in mari sive cum testamento sive sine testamento moriatur, heres suus omnes res suas habeat per donandum xii. d. de relevio."

[2] "Si burgensis de villa morte subitanea obierit, uxor ejus et heredes sui omnia catalla sua et terras suas quiete habebunt. Ita quod dominus suus nec justiciarii manum ponant in domibus vel in catallis defuncti nisi publice excommunicatus fuerit, sed consilio sacerdotis et vicinorum in elemosinis expenduntur."

[3] Reginald de Valle Torta grants to his burgesses: "et quisquis illorum obierit de quacunque morte fuerit, heres ejus catalla ipsius in pace habebit et terram suam per triginta denarios releviabit ad plus."

[4] "Concedimus quod si quis burgensium praedictorum morte subita, quod absit, moriatur, omnia catalla sua sibi fore salva et heredem suum in hereditatem suam per relevium xii. d. libere introire."

[5] Customal of Cardiff and Tewkesbury. See above, under Cardiff.

[6] The exceptions are Chester, Cork, and Pembroke. In the charters of Chester and Cork the formula is merely abbreviated.

[7] "Si dicti burgenses aut eorum aliqui infra terram et potestatem nostram testati decesserint vel intestati, nos vel heredes nostri bona ipsorum confiscari non faciemus, quin eorum heredes ea integre habeant, quatenus dicta catalla dictorum defunctorum fuisse constiterit, dum tamen de dictis heredibus notitia aut fides sufficienter habeatur." This formula is also used in the baronial charters of Laugharne and Oswestry, and in a grant made by Henry III. to the burgesses of St. Omer (Cal. of Charter Rolls, i. 441); instead of "heirs" the charter of Oswestry (1407) has "heirs and executors." The formula, as set forth above, should be compared with that of a charter granted during the reign of Henry II. by his son Richard to the men of La Rochelle: "Quicumque ex illis sive testatus sive intestatus sive confessus sive non morietur, omnes res ejus et possessiones integre et quiete remaneant heredibus suis et genero suo" (Ordonnances des Rois, xi. 318, from the inspeximus of Louis VIII., 1224). An inspeximus of Alphonse of Poitiers, 1241, adds the words "id est" after "intestatus": Besly, Histoire des Comtes de Poitou, 500. For other grants of this privilege to French towns, see Ordonnances des Rois, xi. 319, 321, 337, 495; Auffroy, Évolution du Testament, 557.

demand for this privilege was stimulated in 1256–57 and 1284 by the negotiations between the crown and the papacy.[1] The charters of baronial towns which state that the chattels of burgesses who die suddenly or "by any sort of death" shall go to their heirs, doubtless refer to cases of intestacy. A grant of Henry II. to La Rochelle tells us that a burgher who breaks his neck or is drowned, has not an opportunity to confess and make his will; therefore his property is to be distributed by his kinsmen and friends for the good of his soul.[2]

The town records of England give little information concerning the disposition of the goods of the intestate. The rule laid down in the Preston customal seems to mean that out of his estate provision was to be made for the benefit of his soul by the parish priest and the dead man's friends or kinsmen.[3] According to the customal of Sandwich, which probably records the usages of the fourteenth and fifteenth centuries, the mayor and jurats have the administration of the *bona intestatorum* in the following manner. The mayor takes with him the jurats and sometimes the rector or vicar of the dead man's parish, and they ascertain what he possessed in money, goods, and debts at the time of his death. Then they appoint two executors, who are sworn to make an inventory. After payment of debts and funeral expenses, the residue is divided into three equal parts, if there is a wife and children; into two equal parts, if there is a wife but no children. Then the dead man's part (the third or half) is distributed for the benefit of his soul; and finally the executors render an account before the mayor and jurats, the friends or kinsmen, and the rector or vicar, if they desire to be present. The record adds that this practice has been in use from ancient times without any contradiction on the part of the archdeacon of Canterbury or any other ordinary.[4] The dead man's

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[1] Above, p. 122.

[2] "Si vero aliquis eorum colli fractione vel submersione vel aliquo casu subita morte praeventus fuerit et spatium confitendi non habuerit, concedo ut secundum rationabilem dispositionem et considerationem parentum et amicorum suorum res suae distribuantur et eleemosynae fiant pro anima ipsius": Ordonnances des Rois, xi. 319. See also the claim of the clergy of Normandy in 1190, in Ralph of Diceto, Imagines Hist., ii. 88: "Si quis vero subitanea morte vel quolibet alio fortuito casu praeoccupatus fuerit, ut de rebus suis disponere non possit, distributio bonorum ejus ecclesiastica auctoritate fiet."

[3] Above, p. 127, n. 2.

[4] "Ita semper quod de bonis ipsi defuncto pro portione accidentibus fiat testamentum per visum et auxilium amicorum suorum, si interesse voluerint, et distributio [sit] per manus ipsorum executorum debita et fidelis [secundum quod] credunt quod voluntas sua fuerit dum vixerit, et ad elemosinam et vias emendendas pro anima sua juxta

part was probably expended for pious uses in other towns, like London, York, Chester, Bristol, Dublin, and Newcastle-upon-Tyne, where the tripartite division of the chattels of a man with wife and children existed.[1] But Bracton, after speaking of the law of intestacy and the tripartite division of chattels, vaguely intimates that other rules prevailed in some boroughs and cities.[2] Most of the records say that the personal property of the intestate shall go to his heirs or to his wife and children, without specifying any limitation or legitim. The heirs would, however, probably regard it as a religious duty to do something for the repose of the intestate's soul; and, as at Preston, this would naturally be done with the help or advice of the parish priest. But we hear nothing of the intervention of the ordinary, except at Dublin in 1268, when the citizens resented it;[3] and the Sandwich customal expressly excludes any intervention of this sort. Such opposition to the assertion of episcopal authority was to be expected in towns the magistrates of which had the probate of wills. In many boroughs during the

bonorum quantitatem. . . . Et haec solent fieri ab antiquo usque ad nunc sine aliqua contradictione domini archidiaconi Cantuariensis vel alicujus alterius ordinarii": Boys, Hist. of Sandwich, 524–5. In some parts of France the priest or the kinsmen might make a will on behalf of the intestate: Auffroy, Évolution du Testament, 557; Recueil des Monuments Inédits, ed. Thierry, iv. 408. Many bequests were made by the citizens of Bristol for the repair of highways: Wadley, Abstracts of Wills, *passim*. Another chapter of the Sandwich customal says that the movables of orphans are at the disposition of the mayor and jurats, "quia apud nos catalla et bona mobilia non accidunt hereditarie heredibus defuncti prout accidunt tenementa, redditus et possessiones," but a portion of such chattels is set aside for masses, the repair of roads, and similar works of charity; thus in 1351 two-thirds were distributed in this way, and only one-third went to the heirs: Boys, 514.

[1] For London, York, and Chester, see Sharpe, Cal. of Wills, i. p. xxxiii.; Pollock and Maitland, English Law, 2nd ed., ii. 350; Widdrington, Analecta Eboracensia, 68, 300; Statutes of the Realm (Rec. Com.), vi. 372. The rule laid down in the Chester charter (*c.* 1200, above, p. 126) seems to imply that there was a definite division of the chattels in that city. The Bristol wills often make a threefold division of movables: Wadley, Abstracts of Wills, p. 104, "tertia vero pars sit mihi hoc modo"; *cf. ibid.*, pp. 49, 75–77, 81, 90, 91, 100, 103, etc. For "the dead's portion" (a third) at Dublin, see Gilbert, Cal. of Records, i. 129, 131. The custom of Newcastle-upon-Tyne, that the third part of all the goods of a burgher should be inherited by his children, was adopted by the Scotch burghs: Ancient Laws of the Burghs of Scotland, ed. Innes, 55, 172. Pollock and Maitland, ii. 362, believe that the eldest son or heir could claim no bairn's part; but, according to the Newcastle custom, he was to have the same portion of the goods as any of the other children. The Leges Burgorum, ch. 116, also give a long list of heirlooms or *principalia* which he inherits: Ancient Laws, 56, *cf. ibid.*, 171.

[2] Bracton, f. 61; Fleta, bk. ii. ch. 57, § 10; *cf.* Pollock and Maitland, ii. 350, for a criticism of Bracton's statement regarding London.

[3] Above, p. 122. In the same year the citizens of London were excommunicated for admitting wills to probate in the hustings: Liber de Antiquis Legibus, 106.

thirteenth and fourteenth centuries the municipal magistrates pronounced on the validity of wills [1] and administered justice on behalf of the legatee whose legacy was withheld,[2] though this jurisdiction was evidently regarded with disfavor by the prelates.[3] The municipal authorities before whom wills were proved would naturally claim the right to administer the intestate's property. "The right to regulate the administration of intestates was too closely connected with the testamentary jurisdiction to be conveniently separated from it." [4]

While we have tried to show that there are indications of a struggle of the feudal lords to obtain or maintain their right to confiscate the chattels of intestates — a struggle which lasted from the time of Cnut to the time of Edward I., and of which we still find reminiscences in the records of the fourteenth century, — the main

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[1] For probate in the hustings of London from 1256 onward, see Sharpe, Cal. of Wills, i. pp. xlii–xlvi; Liber Albus, 180, 403, 407; Ricart's Kalendar, 97–99; Pollock and Maitland, ii. 331. See also Domesday of Ipswich, ed. Twiss, 70–86; Bacon, Annals of Ipswich, 10, 16, 25–27, 41–46, 50–55, 59–61, 68–73, etc. (wills proved from 1269 onward); Placitorum Abbreviatio, 211, 216, 235 (Canterbury, Oxford, and London, *temp.* Edw. I.); Little Red Book of Bristol, ed. Bickley, i. 32, 52–54 (ordinance concerning probate, 1344, etc.); Hist. MSS. Com. xi. pt. iii. 188 (grant by Edw. II. that wills touching tenements in King's Lynn shall be proved and enrolled before the mayor); Owen and Blakeway, Hist. of Shrewsbury, i. 382; Oliver, Hist. of Exeter, 222; Widdrington, Analecta Eboracensia, 71. These references suffice to modify or confute the opinion of Bracton and the decision of the royal judges, 19 Edw. I. (Pollock and Maitland, ii. 330), that the jurisdiction over bequests of burgage tenements belonged to the ecclesiastical courts. In some boroughs a will was proved first before a representative of the bishop, and afterwards before a town magistrate in the gildhall: Wadley, Abstracts of Bristol Wills, 3, 5, 7, etc.; Manship, Hist. of Yarmouth, 405; Bacon, Annals of Ipswich, 41; Tighe and Davis, Annals of Windsor, i. 324; Registers of Walter Bronescombe, etc., ed. Hingeston-Randolph, 436 (Exeter); Hist. MSS. Com., xi. pt. iii. 233–4 (King's Lynn). Perhaps a canon of Boniface's Constitutions (1261, Wilkins, Concilia, i. 754; *cf. ibid.*, i. 550, ii. 705) may be directed against this practice: "Item testamentis coram ordinariis locorum probatis et approbatis eorundem probatio seu approbatio testamentorum a laicis nullatenus exigatur." Though the records emphasize the claim of the burgesses that wills devising burgage tenements should be proved in the borough court, many of the wills thus proved (for example, at London, Bristol, and King's Lynn) bequeathed chattels only, or both chattels and land.

[2] Since the first half of the fourteenth century we hear of actions in the borough courts by the writ *ex gravi querela* to recover bequests of burgage tenements: Little Red Book of Bristol, ed. Bickley, i. 33; Liber Assisarum, f. 232, 250; Law Quarterly Review, i. 265. As early as 1291 the legatee had a remedy in the borough court of Ipswich against the executors who would not give him seisin: Domesday of Ipswich, ed. Twiss, 72, 82.

[3] Liber de Antiquis Legibus, 106; Letters from Northern Registers, 71.

[4] Stubbs, in Report of Eccles. Courts Commission, 1883, p. xxiii. He makes this statement in speaking of the jurisdiction of the church tribunals.

object of this paper has been to call attention to the fact that throughout the thirteenth century many boroughs were purchasing from their lords a favor or privilege which, according to Bracton, was the right of every free man. In the very decade when Bracton was asserting that the lord shall not meddle with the intestate's goods, the lords were selling a burghal franchise which implied that they had the right to seize such goods. The importance of personal property in boroughs, which was due to the predominance of mercantile over agricultural interests, would naturally make both the lords and the burgesses inclined eagerly to assert their claims against the pretensions of the prelates. The old law of intestacy, as set forth by Glanvill, pressed more heavily upon the tradesmen, whose wealth was made up mainly of chattels, than upon rural freeholders and villeins. It is not strange, therefore, that the town law since the thirteenth century strove to reject the pretensions of both lords and prelates, and to establish the rule that the chattels of the intestate should go to his kinsmen, who would, however, be expected to devote a portion of his property to pious works for the atonement of his sins and the benefit of his soul.

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